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In The
Supreme Court of the United States

TIMOTHY D. WALKER, JAMES W. BURNS, MARK GOSTYLA, RUSSELL PALTAUF, FERNANDO RAMIREZ, DALE SALMON, ALEXANDER CRUZ, IVAN HERNANDEZ, DAVID KRASNOWSKI, RICHARD T. PALTAUF, ROBERT STOKES, and GERALD ZARELLA,

Petitioners,

v.

CITY OF WATERBURY,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

GARY S. STARR, ESQUIRE
Counsel of Record
BRIAN CLEMOW, ESQUIRE
SHIPMAN & GOODWIN LLP
One Constitution Plaza
Hartford, Connecticut 06103-1919
Telephone: 860-251-5000
Facsimile: 860-251-5216
Email: gstarr@goodwin.com
Attorneys for Respondent

COCKLE LAW BRIEF PRINTING CO (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED FOR REVIEW

I. Whether Petitioners have presented compelling reasons to grant the Petition where the Second Circuit Court of Appeals and the District Court for the District of Connecticut found that the Petitioners did not have a fundamental right under the substantive due process provision of the Fourteenth Amendment to specific pension benefits arising from the terms of an expired labor agreement between their Union and the City of Waterbury, which benefits had been renegotiated with their Union resulting in each Union member receiving a lump sum payment of at least $4000 and a guarantee of continued employment during the term of the collective bargaining contract.

II. Whether Petitioners have presented compelling reasons to grant the Petition where the Second Circuit Court of Appeals and the District Court for the District of Connecticut found that the Petitioners failed to adduce evidence to support a claim that the City of Waterbury acted in a conscience-shocking or arbitrary manner in renegotiating its labor agreement with Petitioners' Union in the face of a severe financial crisis.

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STATEMENT OF JURISDICTION

This court has jurisdiction over this matter as Petitioners[1] seek review of a January 13, 2010 decision of the Second Circuit Court of Appeals. The petition for certiorari is based on 28 U.S.C. § 1254(1). In the district court, jurisdiction was founded on federal question jurisdiction, 28 U.S.C. § 1331, as it alleged a violation of substantive due process by the City of Waterbury ("City") based on the City's renegotiation of its labor contract with Petitioners' union, the International Association of Firefighters, Local 1339 ("the Union").

STATEMENT OF THE CASE

I. Facts Relevant to the Petition

2001 was a difficult year for the City. In early 2001, the Connecticut legislature declared a financial emergency as the City was unable to meet its financial obligations without state intervention. The Connecticut General Assembly passed and the Governor signed Special Act 01-1 to address the City's dire circumstances. In conjunction with this financial bailout, the legislature created the Waterbury Financial Planning and Assistance Board ("Oversight Board")

[1] The Petitioners are: Timothy D. Walker, James W. Burns, Mark Gostyla, Russell Paltauf, Fernando Ramirez, Dale Salmon, Alexander Cruz, Ivan Hernandez, David Krasnowski, Richard T. Paltauf, Robert Stokes, and Gerald Zarella ("Petitioners").

and empowered it to oversee the City's finances. Among its powers, the Oversight Board was authorized to set aside City contracts, to approve or disapprove the City's annual budget, and to act as an arbitration panel with respect to labor agreements. Petitioners' Appendix 8 at p. 8. ("*Pet. App.*").

It was under this shadow of state review that Petitioners' Union and the City negotiated a new labor contract in 2001 to replace the agreement that had continued in effect since its expiration in 1999. The Union and the City bargained throughout 2001, and in November, they reached a tentative agreement. The tentative agreement was presented to the Union's membership on November 6, 2001, at which time the Union's membership ratified the new labor contract. *Pet. App. B at p. 8.* The Union and the City then submitted the tentative agreement to the Oversight Board. The Oversight Board approved it and issued it as an arbitration award on December 14, 2001. *Pet. App. B at p. 8.*

The new labor contract provided that future pension benefits would accrue at 2% of salary per year of service beginning January 1, 2002, instead of at 2½% per year as under the prior contract. *Pet. App. B at p. 8-9.* There was, however, no reduction in what pension each employee had already earned in pension credits. It changed the "20 years and out" retirement eligibility so that an unreduced service pension would begin only after 25 years in the department and also required future retirees to contribute to the cost of health care premiums. *Pet. App. B at p. 9.*

In exchange for these concessions, the labor contract included a $4000 payment to each Union member and additional payments of $750 on July 1, 2002 and on July 1, 2003. Additionally, the City guaranteed that no firefighter would be laid off during the term of the labor contract. *Pet. App. B at p. 9.* The new labor contract reflected negotiated concessions from both sides which changes affected compensation, job security, and retirement benefits.

II. Procedural History and Opinions Below

Petitioners, who are members of the Union, sued the City claiming that the new labor contract deprived them of vested rights arising from expired labor contracts. They claimed that they have constitutionally protected property rights which have been outrageously and arbitrarily reduced in violation of the substantive due process clause of the Fourteenth Amendment. The district court (Kravtiz, J.) properly analyzed this case, ruling that Petitioners did not establish a substantive due process violation, determining that the case is a "run-of-the-mill" contract dispute, and finding that the City and the Union's negotiated agreement, which was approved by the Oversight Board, does not "shock the conscience." *Walker v. City of Waterbury*, 601 F. Supp. 2d 420 (D.Conn. 2009), *aff'd*, 2010 U.S. App. LEXIS 755 (2d Cir. 2010). *Pet. App. B at p. 7.*

Petitioners appealed from the district court's decision granting summary judgment to the City.

Following the submission of briefs and oral argument, the Second Circuit affirmed the decision of the district court. 2010 U.S. App. LEXIS 755 (2d Cir. 2010). *Pet. App. A at p. 1.*

The Second Circuit found that contract rights asserted by Petitioners were simple state law contract rights and do not rise to the level of being fundamental rights "implicit in the concept of ordered liberty." *See Local 342, Long Island Public Serv. Employees, UMD, ILA, AFL-CIO v. Town Board of Huntington*, 31 F.3d 1191, 1196 (2d Cir. 1994). The court also rejected the Petitioners' claim that the City acted in a conscience-shocking or arbitrary manner. It held that the City's response to its dire circumstances was both reasonable and legitimate and that Petitioners adduced no evidence of coercion of the Union by the City. *Pet. App. A at p. 5-6.*

REASONS FOR DENYING THE PETITION

I. Petitioners Do Not Have a Fundamental Right to Unchanging Retirement Benefits

Petitioners seek to transform a contractual right to a future pension benefit into a "fundamental right" under the substantive due process clause of the Constitution. Substantive due process, however, exists to protect interests central to individual freedom and autonomy; not rights derived from a collective bargaining agreement. There is no basis for their claim that future pension benefits are a constitutionally

protected property interest.[2] The interests recognized under substantive due process are rights of privacy, family and procreation – rights so central to an individual's freedom that "neither liberty nor justice would exist if [they] were sacrificed." *Lawrence v. Texas*, 539 U.S. 558, 593 (2003); *See also Harrah Indep. Sch. Dist. v. Martin*, 440 U.S. 194, 198 (1979) (collecting cases discussing interests traditionally accorded substantive due process protection).[3]

Rights arising from labor contracts, and particularly expired labor contracts, do not meet this standard. *Local 342,* 31 F.3d at 1196. Labor contracts do not create special rights for public employees. The terms and conditions of employment, which are detailed in labor contracts, establish contractual obligations, but do not invest employees or their unions with substantive due process protections. *Adams v. Suozzi*, 448 F. Supp. 2d 448, 456 (E.D.N.Y. 2006), *other claims rev'd on other grounds*, 517 F.3d 124 (2d Cir. 2008) (a union's right to collectively bargain is not a right deeply rooted in history or the Constitution and not protected by substantive due process); *Norwalk Teachers' Ass'n v. Norwalk Bd. of Educ.*, 138

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[2] This is not a case in which already earned credits have been reduced, as the changes in the pension provision were all prospective.

[3] Substantive due process has been held to safeguard such intimate activities as marriage, *Loving v. Virginia*, 388 U.S. 1, 12 (1967); contraception, *Griswold v. Connecticut*, 381 U.S. 479, 485-86 (1965); and bodily integrity, *Rochin v. California*, 342 U.S. 165, 171-72 (1952).

Conn. 269 (1951) (Connecticut State Constitution and state laws neither forbid public sector contract negotiations nor require it); *United of Omaha Life Ins. Co. v. Solomon*, 960 F.2d 31, 35 (6th Cir. 1992) (per curiam) (rights under contract to provide insurance to municipal employees are not fundamental and therefore not accorded substantive due process protection). In short, Petitioners have failed to provide any basis for transforming their claim from a "run-of-the-mill" contractually-based property interest to the level of protection afforded by the Constitution. Pension benefits are not central to the individual's freedom. The underlying dispute involves the application of the terms of labor contracts and does not raise substantive due process issues.

II. The Terms of a Labor Contract Can Be Modified Through Collective Bargaining and Do Not Create a Property Right

There is a fundamental fallacy underlining Petitioners' argument that they have a constitutionally protected property right. They assume that their future benefits can only be improved by collective bargaining and never reduced. This misunderstanding of collective bargaining has led them to contend that they have a property right in the terms of expired labor agreements which they want to carry forward after there is a new labor agreement. As active employees, their benefits may rise and fall with each round of negotiations. It is only when they

retire that their benefits are fixed by the terms of the labor agreement in effect at that time. The Constitution does not mandate that benefits established in a collective bargaining agreement carry forward forever. *See Poole v. City of Waterbury*, 266 Conn. 68, 81 (2003). Unlike benefits established by statutes, benefits in a labor contract are subject to change through collective bargaining.

Furthermore, not only are pension benefits an appropriate subject of negotiation, in Connecticut they are a *mandatory* subject of negotiation. *Bd. of Police Comm'rs of the City of New Haven v. White*, 171 Conn. 553, 559-60, 370 A.2d 1070 (1976), (a municipality must bargain about conditions of employment, including pensions and severance pay). Unions and employers must bargain in good faith over such benefits. Where there is bargaining, there is a give and take process that may result in a reduction in benefits. There is no guarantee that benefits once negotiated into a labor agreement will always remain as is or improve because "the climate for successive contract negotiations is never static." *AFSCME Local 818 v. Waterbury*, 389 F. Supp. 2d 431, 436 (D.Conn. 2005), *aff'd*, 198 Fed. Appx. 47, 2006 U.S. App. LEXIS 21873 (2d Cir. 2006), *cert. denied*, 549 U.S. 1180 (2007). *See, e.g., Sparveri v. Town of Rocky Hill*, 396 F. Supp. 2d 214, 219 (D.Conn. 2005) (granting town's motion to dismiss as plaintiff's contractual right to a certain pension calculation did not rise to the level of a constitutionally protected property right); *Costello v. Town of Fairfield*, 811 F.2d 782, 784 (2d Cir.

1987) (holding that retired police officers did not have a constitutionally protected property interest in a benefit increase). Accordingly, Petitioners do not have a constitutionally protected property right in a specific future benefit.

III. Petitioners Are Not Entitled to Greater Rights than Those Afforded to Similarly Situated Persons Working in the Private Sector

Substantive due process protects citizens only from abuses of a government agency when it is exercising governmental authority. It "does not provide a remedy to a public employee that would not be available to a private employee subject to identical conduct by his employer." *McClary v. O'Hare,* 786 F.2d 83, 89 (2d Cir. 1986). Here, the City's action was taken in its role as an employer, not as a governmental agency. Petitioners do not become enveloped in the Constitution just by being City employees. *Costello*, 811 F.2d at 787 (2d Cir. 1987) (concurring opinion). *See also Christ Gatzonis Elec. Contractor, Inc. v. New York City Sch. Constr. Auth.*, No. CV-93-2418 (CPS), 1993 U.S. Dist. LEXIS 9147, at *35 (E.D.N.Y. July 2, 1993) (Sifton, J.), *aff'd*, 23 F.3d 636 (2d Cir. 1994). A change in a collective bargaining agreement which alters future pension and medical benefits would not be actionable against a private employer under substantive due process.

Petitioners' claim is no different than that of private sector employees who claim that their rights under a collective bargaining agreement have been infringed. This is a contract dispute. Substantive due process is simply not applicable under these circumstances. There is no basis for Supreme Court review.

IV. As Active Employees, the Benefits Which Petitioners Will Receive at Retirement Is Undetermined

Petitioners claim to have suffered an "economic deprivation imposed upon them by the City of Waterbury." Petition, p. 4. Petitioners have not retired and have not had their retirement benefits fixed as yet. No determination of what their benefits will be when they retire has occurred and, therefore, they cannot claim a present economic deprivation. They have simply not yet suffered a denial of benefits. Their retirement benefits will be determined only at the time they retire. 266 Conn. 68. Between 2001 and when each actually retires, several labor agreements have been and will be negotiated, which could alter the pension calculation in various ways. At this point, what each will receive in retirement is speculative. *Auerbach v. Bd. of Educ.*, 136 F.3d 104 (2d Cir. 1998); *Bova v. Medford*, 564 F.3d 1093 (9th Cir. 2009). There is no reason to review a case when there are no actual damages.

V. Petitioners Misstate that Changes to the Labor Contract Were "Arbitrarily Imposed Without a Pretense of Collective Bargaining"

Petitioners' description of the case is unrelated to the evidence before the courts below. They assert that the changes in the labor contract were "arbitrarily imposed, without even a pretense of collective bargaining." Petition, p. 3. This misstates the facts in the case. This "factual claim" is made without citation and ignores the statutory process the parties went through. It overlooks the ratification of the proposed agreement by the Union's membership, the joint submission of the agreement to the Oversight Board, and the issuance of the labor contract as an arbitration award. These facts were found by both Judge Kravitz and the Second Circuit and there is nothing in the record to raise a factual dispute over what occurred in the negotiation and adoption of the labor contract in December 2001. *Pet. App. B at pp. 8, 16; Pet. App. A at p. 6.*

The procedure followed in reaching the agreement is a far cry from being arbitrarily imposed. The Petition misrepresents the facts concerning the adoption of the labor contract and therefore there is no basis for the allegation that the City's action was "conscience shocking."

VI. The City's Conduct Does Not Shock the Conscience

An essential element in a substantive due process claim is evidence that the City's actions were "conscience shocking." Petitioners have neither alleged nor produced any evidence that would permit a conclusion that the City's conduct was outrageous or conscience shocking. *Natale v. Town of Ridgefield*, 170 F.3d 258 (2d Cir. 1999). Petitioners have presented no basis for implying or inferring that the actions of the City were irrational or arbitrary.

The City negotiated with the Union under the aegis of the Oversight Board. Seeking to change the terms of a labor contract and reaching an agreement with the Union on modifications is neither irrational nor arbitrary. This was part of the City's effort to address its financial problems. Based on the fiscal crisis faced by the City, the negotiated contract changes were reasonable. The changes in the labor contract were not one sided as the City agreed to provide each member of the Union with job security and an immediate $4000 bonus. Petitioners offered no evidence to suggest that the changes in the labor agreement were outrageous. The fact that Petitioners ignore the benefits gained in negotiations undercuts their position that the City's conduct was conscience shocking.

The City also acted pursuant to a legitimate state purpose. The City, in negotiating contract modifications with the Union and submitting those

modifications to the Oversight Board, acted in compliance with the Oversight Board's legislatively conferred authority and in furtherance of its commitment to the State to address its fiscal crisis. This was clearly a lawful purpose. *See McGrath v. Rhode Island Retirement Bd.*, 906 F. Supp. 749, 769 (D.R.I. 1995), *aff'd*, 88 F.3d 12 (1st Cir. 1996) (upholding legislation which retroactively prevented plaintiff from applying military service to increase pension benefits).

Petitioners seek to gloss over the standard for bringing a substantive due process claim and instead ask that the matter be submitted to a jury. Such a request is not justified by the record. Petitioners have not raised material issues of fact to challenge the City's conduct as sufficiently oppressive, outrageous or shocking so as to impair substantive due process rights. This is particularly the case because the contract changes were negotiated and agreed to by the Union's negotiating team and presented to and approved by the Union's membership! Accordingly, the Petition for Certiorari must be denied.

CONCLUSION

There is no compelling reason for the Court to grant the Writ of Certiorari. There is no conflict among the circuits on the application of the substantive due process clause to public employment. The

elements required for establishing a substantive due process claim do not exist in this case. The interest that the Petitioners have in the terms of an expired labor contract does not rise to the level of being a fundamental right in the constitutional sense. Any claim they might have relating to their pension benefits is nothing more than a contract dispute. The suggestion that fire fighters should be treated differently because of their duties is simply not supported in law. There is nothing about their interest that even remotely compares to the interests of liberty and justice, which are the touchstones of substantive due process jurisprudence.

Equally significant is the fact that the actions of the City were not outrageous. Negotiating changes to future pension benefits in light of a fiscal crisis that required state intervention does not provide any support for an allegation that the City's conduct was shocking to the conscience. This is especially the case where it is undisputed that the changes in the 2001 labor contract were the result of negotiations between Petitioners' Union and the City, which changes were presented to the Union's membership and ratified by the membership before being submitted to the Oversight Board. Petitioners provided no evidence that would raise an issue that would survive a directed verdict or that raises an issue to be decided by a jury.

Based on the entire record in this case and the well reasoned lower court decisions, the Writ of Certiorari must be denied.

Respectfully submitted,

Respondent,
City of Waterbury

GARY S. STARR
Counsel of Record
BRIAN CLEMOW
SHIPMAN & GOODWIN LLP
One Constitution Plaza
Hartford, Connecticut 06103-1919
Telephone: (860) 251-5501
Facsimile: (860) 251-5216